83-1840

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No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MILTON B. DORISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STEPHEN J. KIELY,
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QUESTION PRESENTED

Whether the home venue rule of 18 U.S.C. Sec. 3237(b) is available to a New Jersey resident who has been indicted in the Southern District of West Virginia for violations of 26 U.S.C. Sec. 7206(2), where the government does not rely exclusively on the use of the mails to establish venue?

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CITATIONS

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MILTON B. DORISON,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Milton B. Dorison, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 13, 1983.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of West Virginia, rendered June 3, 1983, appears at 573 F. Supp. 809. It is reprinted in the Appendix to this Petition at 1a. The opinion of the United States Court of Appeals for the Fourth Circuit, rendered on December 13, 1983, is unpublished. It is reproduced in the Appendix to this petition at 5a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 13, 1983. This petition is filed within 60 days of that judgment. Jurisdiction is based upon 28 U.S.C. Sec. 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISION INVOLVED

18 U.S.C. Section 3237 provides:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.
>
> (b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, that the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

STATEMENT OF THE CASE

The petitioner, Milton B. Dorison, a New Jersey resident, was indicted on April 15, 1983 in the Southern District of West Virginia in a thirty (30) count indictment charging him with twenty-nine (29) violations of 18 U.S.C. Sec. 7206(2) and conspiracy (1) to defraud the United States by impeding and obstructing the Internal Revenue Service and, (2) to violate 26 U.S.C. Sec. 7206(2). The gravamen of the indictment is that petitioner and others sold units in various limited partnerships formed to mine coal, with a representation that the venture would accrue losses sufficient to provide the investors with a tax shelter. The government claims that the promoters knew that the coal reserves leased by the partnerships would not support the claimed deductions and thereby aided and abetted the filing of false income tax returns by both the partnerships and the investors in each partnership. It is conceded that both the partnership and the individual income tax returns at issue were mailed to the Internal Revenue Service.

The petitioner filed a timely motion pursuant to 18 U.S.C. Sec. 3237(b) to transfer trial of the case to his home district, New Jersey. Relying on the recent Fourth Circuit decision in *In re United States (Nardone)*, 706 F.2d 494 (4th Cir.), *cert. denied*, 104 S.Ct. 496, ____ U.S. ____ (1983), the motion was denied by the District Court Judge. *United States* v. *Dorison*, 573 F. Supp. 809 (S.D.W.Va. 1983). Thereafter, the petitioner filed a petition for a writ of *mandamus* with the Fourth Circuit Court of Appeals seeking to have the case transferred to the District of New Jersey. The court denied the petition in a brief *per curiam* opinion which relied exclusively on *Nardone*. Petitioner's co-defendant, Lance Eisenberg, a Florida resident, has challenged the jurisdiction of the

District Court for the Southern District of West Virginia in a like fashion at every stage of the proceeding. His petition for a writ of *certiorari* is being filed contemporaneously with this petition.

REASONS FOR GRANTING THE WRIT

The petitioner hereby incorporates the arguments set forth in Lance Eisenberg's petition for a writ of *certiorari* as if fully set forth herein.

Respectfully submitted,

THOMAS E. DWYER, JR.,
STEPHEN J. KIELY
Dwyer & Murray
7 Union Wharf
Boston, MA 02109

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari were served on each of the following: Rex E. Lee, Solicitor General of the United States, Tenth & Constitution Avenue, N.W., Washington, D.C. 20530; Mary S. Feinberg, Assistant United States Attorney, Federal Building, 500 Quarrier Street, Charleston, West Virginia 25301; Martin R. Baach, 1800 M Street, N.W., Washington, D.C. 20036; and Benjamin Brafman, 18 E. 47th Street, New York, New York 10021, by depositing true copies thereof in the United States mail, first-class, postage prepaid on this 13th day of February, 1984.

Thomas Dwyer

APPENDIX

UNITED STATES DISTRICT COURT,
S.D. WEST VIRGINIA,
CHARLESTON DIVISION.

June 3, 1983.

Crim. Nos. 83-20034-01 to 83-20034-03.

UNITED STATES OF AMERICA,

Plaintiff,

v.

MILTON B. DORISON, RICHARD M. FIRESTONE AND LANCE E. EISENBERG,

Defendants.

Defendants were charged with knowingly conspiring to defraud the United States by obstructing the Internal Revenue Service's computation, assessment and collection of federal income taxes and to commit offenses against the United States by aiding and assisting in the preparation and presentation of materially false and fraudulent income tax returns. On motions to change of venue to the respective districts in which defendants lived, the District Court, Haden, Chief Judge, held that the defendants were not entitled to a change of venue where the Government maintained that venue was proper in the Southern District of West Virginia, wholly apart from any use of the mails.

Motions for change of venue denied.

Thomas E. Dwyer, Jr., Dwyer & Murray, Boston, Mass., Larry G. Kopelman, Charleston, W.Va., for Milton B. Dorison.

Benjamin Brafman, New York City, for Richard M. Firestone.

Martin R. Baach, Nussbaum, Owen & Webster, Washington, D.C., James K. Brown, Charleston, W.Va., for Lance E. Eisenberg.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

On April 12, 1983, a grand jury returned the within thirty-count indictment, wherein Count One alleges that between approximately December, 1975, and the summer of 1979, that the Defendants, Dorison, Firestone and Eisenberg violated 18 U.S.C. § 371 by knowingly conspiring (1) to defraud the United States by obstructing the Internal Revenue Service's computation, assessment and collection of federal income taxes, and (2) to commit offenses against the United States by aiding and assisting in the preparation and presentation of materially false and fraudulent income tax returns. The indictment further charges Dorison, who then resided in the District of New Jersey, and Firestone, who then resided in the Southern District of New York, with having committed twenty-nine substantive violations of 26 U.S.C. § 7206(2)[1] and 18 U.S.C. § 2. Eisenberg, who then resided in the Southern District of Florida, is named as a Defendant in six[2] of these substantive counts. After their arraignment on these charges, each of the Defendants filed a timely motion for a change of venue to the respective districts wherein they reside, pursuant to 18 U.S.C. § 3237(b).[3]

---

[1] 26 U.S.C. § 7206(2) provides:

"Any person who . . . [w]illfully aids or assists in or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document [shall be guilty of an offense against the United States]."

[2] *See* Counts Nine—Fourteen.

[3] 18 U.S.C. § 3237(b) provides in pertinent part as follows:

"[W]here an offense involves use of the mails and is an offense described in Section . . . 7206 . . . (2) . . . of . . . [the internal

The resolution of these motions is governed[4] by the Fourth Circuit's recent holding in *In Re U.S. (Nardone)*,[5] wherein it adopted the minority view that a defendant who is being prosecuted for an alleged violation of 26 U.S.C. § 7206(2) is not entitled to a change of venue to the district of his residence, pursuant to 18 U.S.C. § 3237(b), unless the *only* nexus between the alleged violation and the district wherein he was indicted was the use of the mails. Accordingly, Section 3237(b):

> "Is not a sword enabling the taxpayer to transfer prosecution to his district of residence in cases . . . where the government seeks to establish venue wholly apart from any use of the mails. The statute does not enable a taxpayer who has violated the law in a district by means other than the use of the mails to escape prosecution in that

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revenue] code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided* that the motion is filed within twenty days after arraignment of the defendant upon indictment . . ."

While the Government admits that the individual and partnership tax returns which are the subject of the twenty-nine substantive counts of the within indictment were filed with the Internal Revenue Service by means of the United States mail, it nonetheless maintains that these offenses do not "involve the use of the mails", as that term is used in Section 3237(b).

[4] Contending that *Nardone* neither accords Section 3237(b) its plain meaning, nor comports with the statute's legislative history, the Defendants would have the Court disregard, or at least, criticize its holding. Naturally, the Court declines their invitation, inasmuch as it is obligated to apply the law as enunciated by the United States Court of Appeals for the Fourth Circuit. *See Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975).

[5] 706 F.2d 494 (4th Cir. 1983) (petition for rehearing *en banc* pending), *adopting In Re U.S. (Clemente)*, 608 F.2d 76 (2d Cir. 1979).

> district simply by mailing a letter. We construe § 3237(b) to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence."

In Re U.S. (Clemente), 608 F.2d 76, 80-81 (2d Cir. 1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1834, 64 L.Ed.2d 260 (1980). *But cf.*, *U.S.* v. *United States District Court*, 693 F.2d 68 (9th Cir.1982); *U.S.* v. *DeMarco*, 394 F.Supp. 611 (D.D.C.1975); *U.S.* v. *Youse*, 387 F.Supp. 132 (E.D.Wis.1975); *U.S.* v. *Dalitz*, 248 F.Supp. 238 (S.D.Cal.1965); *U.S.* v. *Rosenberg*, 226 F.Supp. 199 (S.D.Fla.1964); *U.S.* v. *Kimble*, 186 F.Supp. 616 (S.D.N.Y.1960); *U.S.* v. *Wortman*, 26 F.R.D. 183 (E.D.Ill.1960), *reversed on other grounds*, 326 F.2d 717 (7th Cir.1964).

Inasmuch as the Government maintains the venue on the Section 7206(2) counts is proper in the Southern District of West Virginia, wholly apart from any use of the mails, the Court hereby denies the Defendants Dorison, Firestone and Eisenberg's timely motions for a change of venue, pursuant to 18 U.S.C. § 3237(b).

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1513

In Re: LANCE E. EISENBERG,

Petitioner.

No. 83-1514

UNITED STATES OF AMERICA,

Appellee,

versus

LANCE E. EISENBERG,

Appellant.

No. 83-1576

In Re: MILTON B. DORISON,

Petitioner.

No. 83-1577

UNITED STATES OF AMERICA,

Appellee,

versus

MILTON B. DORISON,

Appellant.

No. 83-1648

UNITED STATES OF AMERICA,

Appellee,

versus

RICHARD M. FIRESTONE,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden, II, District Judge. (CR 83-20034-03,01)

Argued October 5, 1983. Decided December 13, 1983

Before RUSSELL, WIDENER, and PHILLIPS, Circuit Judges.

Martin R. Baach (Nussbaum, Owen & Webster; James K. Brown, Jackson, Kelly, Holt & O'Farrell; Earl J. Silbert, Schwalb, Donnenfeld, Bray & Silbert, P.C. on brief) for Appellant; Mary S. Feinberg, Assistant United States Attorney (David A. Faber, United States Attorney, Benjamin L. Bailey, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Before the court is a petition by Lance E. Eisenberg for a writ of mandamus requiring Chief Judge Haden of the United States District Court for the Southern District of West Virginia to transfer venue of the tax fraud prosecution against Eisenberg to the Southern District of Florida, where Eisenberg resides. We deny the petition.

On April 15, 1983, Eisenberg, with others, was indicted in the Southern District of West Virginia under 26 U.S.C.

§ 7206(2) for various tax fraud offenses. He moved in that district for transfer to the Southern District of Florida, where he resides, under the provisions of 18 U.S.C. § 3237(b). In pertinent part that venue statute provides that such an election of venue may be made by a defendant when prosecution for an offense that "involves use of the mails" and that is "described in section . . . 7206(2) . . . is begun in a judicial district other than the judicial district in which the defendant resides."

While Eisenberg's motion for transfer was pending in the district court, another panel of this court construed the critical phrase "involves use of the mails" in § 3237(b) in a way which precluded Eisenberg's invocation in the instant prosecution of that statute's election of venue provision. *See In Re United States of America (Nardone)*, 706 F.2d 494 (4th Cir. 1983). Faithful to that decision, Chief Judge Haden denied Eisenberg's transfer motion on June 3, 1983. Eisenberg seeks to have that order vacated and transfer compelled by our issuance of the writ of mandamus.

We could only do so by reversing the decision of the *Nardone* panel and on that basis then invoking our supervisory writ power under 28 U.S.C. § 1651, the All-Writs Statute, to compel compliance with newly declared circuit law. Laying aside all questions of the general propriety of exercising our supervisory writ power to review orders granting or denying transfers of venue, we obviously may not invoke it to direct transfer in this case. *Nardone* has declared the law of this circuit and we have no power under the procedures of this court to reverse or avoid that decision, even were we disposed—as we are not—to reexamine the question of statutory construction it carefully addressed. Chief Judge Haden not only acted within his jurisdiction in denying the transfer motion, he acted in direct compliance with the binding rule of law declared for this circuit in *Nardone*.

The petition for writ of mandamus is accordingly denied.

DENIED.

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Nos. ~~83-1339~~ and 83-1340

In the Supreme Court of the United States

OCTOBER TERM, 1983

LANCE E. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON B. DORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1339

LANCE E. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1340

MILTON B. DORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in upholding the district court's denial of their motions for a change of venue. The question presented is identical to that presented by the petitioner in *Nardone* v. *United States*, No. 83-5266, in which certiorari was denied on November 28, 1983.

On April 12, 1983, petitioners were indicted in the Southern District of West Virginia on one count of conspiracy, in violation of 18 U.S.C. 371, and on multiple counts of aiding

and assisting in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The indictments grew out of petitioners' roles in establishing and promoting an allegedly fraudulent tax shelter scheme involving the use of coal mining limited partnerships. Following their arraignment, petitioners moved for a change of venue to the districts in which they resided, citing 18 U.S.C. 3237(b). The district court denied their motions, citing the Fourth Circuit's decision in *In re United States (Nardone)*, 706 F.2d 494 (1983), cert. denied, No. 83-5266 (Nov. 28, 1983). The Fourth Circuit in *Nardone* adopted the reasoning of the Second Circuit in *In re United States (Clemente)*, 608 F.2d 76, 80-81 (1979), cert. denied, 446 U.S. 908 (1980), to the effect that Section 3237(b) —

> is not a sword enabling the taxpayer to transfer prosecution to his district of residence in cases * * * where the Government seeks to establish venue wholly apart from any use of the mails. The statute does not enable a taxpayer who has violated the law in a district by means other than use of the mails to escape prosecution in that district simply by mailing a letter. We construe § 3237(b) to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence.

Upon the district court's denial of their motions, petitioners sought a writ of mandamus from the court of appeals, which held that *Nardone* had "declared the law of [the] circuit" on the question presented, and said that it was neither willing nor able "to reexamine the question of statutory construction [that *Nardone*] carefully addressed" (83-1339 Pet. App. 6a-7a). The petitions for writ of mandamus were accordingly denied.

Petitioners contend that the court of appeals erred in following *Nardone*, making essentially the same arguments that the petitioner in that case made. Regardless of the merits of petitioners' contentions, they are not ripe for review by this Court. If petitioners are acquitted after trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions, together with any other claims they may have, to this Court in petitions for writs of certiorari seeking review of final judgments against them. Review of the court of appeals' decision now would thus be premature.[1]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

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[1]Over a year has passed since the indictment in this case was issued. Further interlocutory review would cause serious additional delay in the trial of the charges against petitioners.

Because this case is at an interlocutory stage, we are not responding on the merits of petitioners' contentions. We will do so if the Court requests.

DOJ-1984-04